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NOTES.

A NEW RULE AGAINST PERPETUITIES IN NEW YORK.—The New York Revised Statutes enacted that every future estate should be void which suspended the absolute power of alienation beyond two lives in being, except in a single case indicated.¹ The absolute power of alienation was said to be suspended "when there are no persons in being by whom an absolute fee in possession can be conveyed."² This limitation of restraints on alienation, often invoked, has been frequently said to be the *only* Rule against Perpetuities in New York.³ And it is declared to be a necessary consequence that no limitation of a future estate which could not suspend the power of alienation beyond two lives in being can be void for remoteness.⁴ In a recent case, however, the Court of Appeals has squarely held

¹1 R. S. ch. 723 § 15.

²1 R. S. ch. 723 § 14.

³*Sawyer v. Cubby* (1895) 146 N. Y. 192; *Robert v. Corning* (1882) 89 N. Y. 225; *Williams v. Montgomery* (1896) 148 N. Y. 519, 526; *Gott v. Cook* (1839) 7 Paige 521, 542, 543; *Hawley v. James* (1833) 16 Wend. 1, 128, 130; *Reeves, R. P.* (Ed. 1904) 853; *Fowler, R. P.* 158, 168.

⁴*Sawyer v. Cubby*, *supra*; 59 Albany L. J. 351, 355, 356; *Fowler, R. P.* 159; *Reeves, R. P.* (Ed. 1904) 853.

that the rule against remoteness is law in New York, and that a contingent gift over of personal property which might not vest absolutely, if ever, within two lives in being, was void, though all the interests would be alienable within that time. *Matter of Wilcox*, N. Y. L. J. Mar. 1, 1909.

The argument, as stated by Cullen, C. J., is this: 1. The Revisers intended to establish a rule against remoteness, for (a) This was the common law rule with which they were familiar and in which the suspension of the power of alienation "was no factor." (b) Sec. 17, 1 R. S. ch. 723, prohibiting more than two successive life estates is at least one instance of a rule controlling future estates which has no necessary connection with the suspension of the power of alienation. (c) The provisions of Sec. 24, 1 R. S. ch. 723, were wholly unnecessary if the only rule concerned suspension of the power of alienation; Secs. 14 and 15 had covered that subject. (d) One text writer had so construed the statutes.⁵ 2. The rule against remoteness had already been applied in decided cases.⁶ 3. The single rule against suspension of alienation would make it possible, practically, to tie up an estate for an unlimited term, as by a trust with the power of termination in the trustee.

The sole point at issue here is: Do the New York Statutes prohibit the limitations of the principal case? Considerations of public policy, which would discourage the creation of interests subject to be divested on a remote contingency, are irrelevant to a construction of statute law, aside from the question of legislative intent. The intention of the Revisers is not in all respects free from doubt. But in its effort to ascertain that intention the court, it is conceived, has been influenced by some evident misconceptions. The statement that the suspension of the power of alienation "was no factor" in the common law Rule against Perpetuities at the time the Revised Statutes were enacted (1830), is an error. The Rule in its origin and purpose represents an effort of the courts to prevent the tying up of property beyond proper limits.⁷ This has been clearly shown in the discussions which were prompted by Professor Gray's thesis for the test of remoteness.⁸ Final expression of the Rule was not given until 1833,⁹ and its application to contingent future interests alienable at law *in praesenti*—"an extension of the Rule beyond the needs which gave it birth"¹⁰—was not established until half a century later.¹¹ The fact is *per contra* that eminent judges and lawyers before and after 1830 frequently explained the Rule against Per-

⁵Chaplin, Restraints on Alienation 1.

⁶These cases are *Oxley v. Lane* (1866) 35 N. Y. 340; *Knox v. Jones* (1872) 47 N. Y. 389; *Robert v. Corning*, *supra*; *Henderson v. Henderson* (1889) 113 N. Y. 1; *Greenland v. Waddell* (1889) 116 N. Y. 234.

⁷For the change of Prof. Gray's view, see Gray, Rule against Perpetuities, (2nd Ed.) 240 (1906) as compared with 1st Ed. *Ibid.* 194 (1886); Reeves, R. P. (Ed. 1904) 838 *et seq*; Note to *Cadell v. Palmer*, Tudor Lead. Cas. R. P. (4th Ed.) 591; Argument of Mr. Hargrave in *Thellusson v. Woodford*, 2 Jur. Arg. 7.

⁸Reeves, R. P. (Ed. 1904) 838 *et seq*; 14 L. Q. R. 240; 59 Albany L. J. 351; 1 COLUMBIA LAW REVIEW 165, 176.

⁹*Cadell v. Palmer* (1833) 1 Cl. & F. 372.

¹⁰Gray, Rule against Perpetuities (2nd Ed.) 250. In 1879 this application was denied because "the rule is aimed at preventing the suspension of the power of dealing with property." *Per Fry, J., in Birmingham Canal Co. v. Cartwright* (1867) L. R. 11 Ch. Div. 421.

¹¹*London & S. W. Ry. Co. v. Gomm* (1882) L. R. 20 Ch. Div. 562; *Re Hargraves* (1890) L. R. 43 Ch. Div. 401, overruling *Gilbertson v. Richards* (1860) 4 H. & N. 277, 5 H. & N. 453; *Avern v. Lloyd* (1868) L. R. 5 Eq. 383; *Birmingham Canal Co. v. Cartwright*, *supra*.

petuities as a safeguard of alienation.¹² Chancellor Kent so regarded it;¹³ and Professor Gray himself understands the Revised Statutes to have been framed upon that conception.¹⁴ Nor is the court helped by its reference to Secs. 17 and 24, 1 R. S. ch. 723. Sec. 17 has no more necessary connection with remoteness than with alienability, for successive life estates may all be vested. Sec. 24 was expressly enacted to permit certain estates to be created by a conveyance which could at common law be limited only by a use or executory devise.¹⁵ That the Revisers understood a perpetuity to be an inalienable estate is clear from their Notes. Their purpose, as expressly stated, was "to define with precision the limits within which the power of alienation may be suspended by the creation of *contingent* estates." And they add "It is presumed that no argument need be advanced in favor of restricting, at least to the extent here proposed, the power of creating perpetuities."¹⁶ Some of the sections enacted are ambiguous, but they are capable of a reasonable interpretation which is consistent with this avowed purpose.¹⁷ If further proof of intention to establish but one rule is needed, a comparison of the two rules will make it clear. Suspension of alienation is neither a sure or necessary test of the validity of *contingent* limitations when vesting in interest is also required. For it could not save such a limitation if too remote, while the rule against remoteness, in requiring an estate to vest absolutely, secures alienability also. Therefore remoteness is not, as the opinion suggests, merely a second test of perpetuity, but practically supersedes the older rule in a large class of cases. It is highly improbable that the Revisers would have provided in express terms for a subordinate and uncertain rule leaving a broader and more exacting test to doubtful inference.

The cases cited by the court to sustain its contention are not convincing. In *Henderson v. Henderson*⁸ alone does it appear that limitations were held void as too remote though all the interests were apparently alienable within the statutory period.¹⁸ The reasoning in *Knox v. Jones*⁹ and *Greenland v. Waddell*¹⁰ was based, evidently, upon undue suspension of alienation involved in trust estates preceding the executory limitations. In *Oxley v. Lane*,⁵ the court manifestly thought, whether correctly or not, that the power of alienation was suspended by the contingent gifts over. The argument from *Robert v. Corning*⁶ was confessedly by inference, for the limitations were there sustained. In none of these cases was there any discussion of such a rule as that laid down in the principal case. On the other hand, there is well-considered adverse authority which was not referred to by the

¹²Corbet's Case (1599) Moore 592; Norfolk's Case (1681) 3 Ch. Cas. 1, 31; Scatterwood v. Edge (1698) 1 Salk. 229, 230; Stephens v. Stephens (1736) Cas. Temp. Talb. 228, 232; Marlborough v. Godolphin (1759) 1 Eden 404, 418; Thellusson v. Woodford (1805) 11 Ves. 112, 146; Sugden's Note to Gilbert on Uses (London Ed. 1811) 260; Cadell v. Palmer (1833) 372, 393, 416; Christ's Hospital v. Grainger (1849) 1 McN. & G. 460; Blake v. Dexter (1853) 12 Cush. 559, 570; Birmingham Canal Co. v. Cartwright (1867) *supra*.

¹³4 Kent Comm. (1 Ed. 1830) 257.

¹⁴Rule against Perpetuities (2nd Ed.) 542.

¹⁵Revisers' Notes, 5 Statutes at Large (2nd Edmonds) 566; *Hennesy v. Patterson* (1881) 85 N. Y. 91; *Hawley v. James* (1833) 16 Wend. 1, 130.

¹⁶5 Statutes at Large (2nd Edmonds) 565; see also 563 *et seq.*

¹⁷Prof. Canfield, 1 COLUMBIA LAW REVIEW 224.

¹⁸For cases, not cited, in accord with *Henderson v. Henderson*, see 1 COLUMBIA LAW REVIEW 224.

court.¹⁹ The contention that alienable interests might be too remote was urged upon Judge Finch in *Sawyer v. Cubby*,²⁰ but he denied its validity and stated in unmistakable terms that a suspension of absolute ownership could occur in New York "only when there are no persons in being by whom an absolute estate in possession can be conveyed." If it be conceded that the cases in New York were in conflict, it is submitted that the court could be justified in reaching the result of the principal case only after a thorough examination of the authorities and a frank repudiation of the test of a perpetuity laid down by Judge Finch.

The consequences of the judicial adoption of the rule against remoteness in New York must be far reaching. Its application to limitations of real property cannot be doubted.²¹ If, therefore, a contingent fee to a person in being and his heirs is limited upon a fee, the contingency must be certain to occur, if ever, within two lives in being or the limitation will be void. How far will the court go in applying the so-called common law rule against remoteness? There are a number of future interests, condemned for remoteness in the English cases,²² which have never been challenged in New York because they were always alienable. The Court of Appeals has unfortunately introduced a new element of confusion into a field of law whose uncertainty had already caused excessive litigation.

RATE MAKING—A JUDICIAL, LEGISLATIVE, OR MINISTERIAL FUNCTION?—While recognizing the essential separation of the departments of government¹ and the fundamental distinction between legislative and judicial acts,² the courts are not agreed on the criterion that is to determine into which category rate making by commission is to be placed. Obviously the mere legislative designation of the commission as a court is without weight.³ Similarly, the character of the commission and the form of its procedure, though suggested as tests,⁴ are not conclusive for the performance by the regular courts of non-judicial acts does not make the acts judicial.⁵ Neither is a judicial act any the less so because performed by a non-judicial body,⁶ nor the action of such a body made judicial by the employment of court methods.⁷ But even were the character of the commission or of its procedure determinative, they would scarcely stamp as judicial the usual commission hearing to which the parties need not be noticed to appear, which is not governed by the ordinary rules of evidence, and terminates in an order not

¹⁹*Sawyer v. Cubby*, *supra*; *Beardsley v. Hotchkiss* (1884) 96 N. Y. 201.

²⁰*Supra*.

²¹See the now significant dictum of Cullen, J., in *Henderson v. Henderson* (1887) 46 Hun, 509, 514; *Gott v. Cook* (1833) 7 Paige 521, 543.

²²*London & S. W. Ry. Co. v. Gomm*, *supra*.

¹*Federalist*, Nos. 46, 47; *Kilbourn v. Thompson* (1880) 103 U. S. 168; *Matter of Davies* (1901) 168 N. Y. 89, 101.

²*Merrill v. Sherburne* (1818) 1 N. H. 199; *Bates v. Kimball* (Vt. 1824) 2 Chip. 77; *Sinking Fund Cases* (1878) 99 U. S. 700, 761; *People v. Bd. of Ed.* (1880) 54 Cal. 375.

³*So. Ry. Co. v. Greensboro, etc. Co.* (1904) 134 Fed. 82, 94.

⁴*Prentiss v. Atl. etc. Co.* (1909) 211 U. S. 210, opinions of Fuller, C. J., and Harlan, J.

⁵*U. S. v. Ferreira* (1851) 13 How. 40; *Matter of Saline County* (1869) 45 Mo. 52; *Robey v. The County* (1900) 92 Md. 150.

⁶*Calder v. Bull* (1798) 3 Dall. 386; *Comrs. v. Griffin* (1890) 134 Ill. 330, 341; *Robinson v. Supervisors* (1860) 16 Cal. 208.

⁷*Gordon v. U. S.* (1864) 117 U. S. 697.